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SUPREME COURT, U.S.
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No. 04-1291

IN THE

Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The El-Shifa Pharmaceutical Industries Company has no parent company, and its shares are not publicly traded.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

REPLY FOR PETITIONERS.....1

CONCLUSION.....8

TABLE OF AUTHORITIES

Page

Cases

Amer. Mfrs. Mut. Ins. Co v. United States,
453 F.2d 1380 (Ct. Cl. 1972).....2
Bond v. United States, 2 Ct. Cl. 529 (1866).....5
Central Union Trust Co. v. Garvan,
254 U.S. 554 (1921) 5
Clark v. Uebersee Finanz-Korporation,
332 U.S. 480 (1947) 6, 7
Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 1, 3, 4, 7
Harrison v. United States, 6 Ct. Cl. 323 (1870) 5
Hill v. United States, 8 Ct. Cl. 470 (1872).....5
Juragua Iron Co. v. United States,
212 U.S. 297 (1909) 2
LaPlante v. United States, 6 Ct. Cl. 311 (1870) 5
Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 395 U.S. 85 (1969).....2
Russian Volunteer Fleet v. United States,
282 U.S. 481 (1931) 7
Silesian-American Corp. v. Markham,
156 F.2d 793 (2d Cir. 1946) 7
Stoehr v. Wallace, 255 U.S. 239 (1921) 5
Turney v. United States, 126 Ct. Cl. 202,
115 F. Supp. 457 (1953).....2
Uebersee Finanz-Korporation v. Markham,
158 F.2d 313 (D.C. Cir. 1946).....6
United States v. Caltex (Philippines), Inc.,
344 U.S. 149 (1952) 2, 3
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 2
Von Zedtwitz v. Sutherland,
26 F.2d 525 (D.C. Cir. 1928).....5

Statutes

Pub. L. No. 65-91, 40 Stat. 411 (1917).....5, 6, 7

REPLY FOR PETITIONERS

The decision below foreclosed judicial review of Petitioners' takings claim based on an application of the political question doctrine that is overreaching and unnecessary but not unfamiliar. This Court reviewed and rejected a similar dismissal in deference to executive authority in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), reasoning that the President's designation of an individual as an enemy combatant is subject to judicial review. The decision below, in holding an executive designation of enemy property unreviewable in light of the political question doctrine, cannot be reconciled with *Hamdi*.

The Government contends that that blatant conflict does not warrant this Court's attention, because neither *Hamdi* nor the decision below phrased their holdings in terms of generally applicable rules regarding review. It argues first that the Federal Circuit did not articulate a broad rule of unreviewability in conflict with *Hamdi*, but only diverged from *Hamdi*'s result on a different set of facts. That facile distinction is unavailing. *Hamdi* rejected the very arguments in favor of foreclosing judicial review that the Federal Circuit embraced. *See* Pet. 7-8. The conflict is direct and apparent. The Government likewise insists that "*Hamdi* did not announce a categorical rule that determinations by the President and others in the realm of military affairs are *always* subject to judicial review." Opp. 6 (emphasis in original). Whatever label the Government applies to the holding in *Hamdi*, that decision unarguably articulated a principle in direct conflict with the decision below: That an executive designation of enemy status is not immune from judicial review simply because it touches upon a political determination.

1. But for the application of the political question doctrine, Petitioners stated a valid takings claim. Petitioners' takings claim survived dismissal on every issue except the political question doctrine. The Government

attempts to shift the focus by arguing that Petitioners' complaint should have been dismissed on other grounds. Opp. 5-9. Yet both issues the Government presents as obstacles to review in this Court were resolved in Petitioners' favor in the courts below, and neither is the subject of a cross-petition by the Government. The Government attempts to revive the issue of subject matter jurisdiction, arguing that the Reciprocity Act prevents the Court of Claims from hearing a takings claim brought by a citizen of the Sudan. Opp. 5 n.1. The Government also revisits the issue of standing, insisting that "petitioners have no rights under the Just Compensation Clause" because they are nonresident aliens whose property was located outside the United States. Opp. 7-8 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). The Government made both arguments, unsuccessfully, in the courts below. The Federal Circuit termed the Reciprocity Act argument the "weakest" of the Government's grounds for dismissal (App. 12a), and it declined to overrule *Turney v. United States*, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953), in which the Court of Claims awarded just compensation under the Takings Clause for the seizure of a nonresident alien's overseas property, on the basis of *Verdugo-Urquidez*. App. 9a ("[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States.").

No more availing is the Government's list of military takings cases in which an award of compensation was denied after full review or reversed on appeal. Opp. 8. The likelihood that Petitioners' claim will succeed on its merits is not before this Court. Petitioners cite *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952), *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969), *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), and *Amer. Mfrs. Mut. Ins. Co v. United States*, 453 F.2d 1380 (Ct. Cl. 1972), not to establish their ultimate entitlement to

compensation, but instead to demonstrate the general *availability* of a takings claim arising from military destruction of property and the propriety of judicial review of the facts on a case-by-case basis. *Caltex*, 344 U.S. at 156.

The Government's suggestion that Petitioners' claim is legally flawed is premature. Petitioners were denied the opportunity to present their claim for review – indeed, they were denied the opportunity even to demand an answer to their complaint – based solely on the application of the political question doctrine. It is the proper application of that doctrine on which Petitioners seek this Court's review.

2. The Federal Circuit's application of the political question doctrine conflicts with the right to judicial review established in *Hamdi*. The Government's insistence that the decision below presents no conflict with *Hamdi* (Opp. 5-6) ignores the necessary implication of *Hamdi*: That after-the-fact judicial review of an executive determination of enemy status poses no threat to executive authority, infringes upon no question entrusted to the Executive Branch for resolution, and consequently provides no basis for invoking the political question doctrine. The Government nevertheless maintains that *Hamdi* did not establish that a federal court "may review and potentially reject the President's determination that a particular facility was enemy property." Opp. 6. In fact, *Hamdi* stands for precisely that proposition.

Hamdi sanctioned judicial review of an executive determination of enemy combatant status despite the Government's arguments that such review would interfere with the President's prerogative as Commander in Chief. Pet. 7. As *Hamdi* suggests, after-the-fact review does not require "judicial supervision" (App. 24a, 32a) or "second-guess[ing]" (Opp. 10, App. 76a) of executive decision-making. Nothing in *Hamdi* limits the President's authority to make enemy status determinations based on intelligence he deems appropriate, just as nothing in Petitioners'

complaint purports to restrict the President's authority to make enemy property designations or targeting decisions.[1] *Hamdi* considered a different question: whether the very nature of a presidential enemy status designation was sufficient to nullify any challenge to its factual basis. This Court held that it was not: "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Hamdi*, 124 S. Ct. at 2651. Because the Federal Circuit "simply presumed correct" President Clinton's designation of the El-Shifa plant as enemy property and invoked the political question doctrine to deny Petitioners "any opportunity . . . to demonstrate otherwise," the decision below is in direct conflict with *Hamdi*.

3. Judicial review of takings claims does not constrain military decision-making. As further justification for depriving Petitioners' takings claim of judicial review, the Federal Circuit cited its reluctance to interfere with the "exigencies of waging war on the battlefield." App. 34a. The Government invokes the same concern for protecting military operations from judicial interference. Opp. 10-11. That fear is unwarranted given the extraordinary set of circumstances that must combine to give rise to a takings claim like Petitioners' (Pet. 11), and given the federal courts'

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[1] Indeed, the "legitimacy or authority of the Government's action must be conceded in takings proceedings." App. 72a. Because Petitioners' claim accepts the exercise of executive authority as proper, judicial review of that claim does not require a federal court to evaluate or supervise, much less limit, the exercise of that authority. A federal court deciding Petitioners' takings claim will be asked to do nothing more than consider whether El-Shifa was in fact owned or controlled by an enemy, and if not, whether Petitioners are entitled to compensation for the loss of their property. In other words, their complaint asks the federal courts only to address "the risk of erroneous deprivation" of a property interest, *Hamdi*, 124 S. Ct. at 2649, and, if appropriate, to afford a remedy.

long history of reviewing more commonly raised enemy status determinations without detriment to military operations.

The Court of Federal Claims has reviewed designations of enemy and enemy property status for error since the Civil War Era. *See, e.g.*, *Bond v. United States*, 2 Ct. Cl. 529, 535 (1866) (deciding, on the facts, whether claimant had "given aid or comfort to the recent rebellion"); *Harrison v. United States*, 6 Ct. Cl. 323 (1870); *LaPlante v. United States*, 6 Ct. Cl. 311 (1870); *Hill v. United States*, 8 Ct. Cl. 470 (1872) (determining whether nonresident aliens had aided the Confederacy or were entitled to compensation for their seized property). Likewise, the district courts have reviewed direct challenges to the President's enemy property determinations since the First World War, pursuant to the review provision of the Trading with the Enemy Act ("TWEA"), Pub. L. No. 65-91 § 9, 40 Stat. 411, 419 (1917) (codified at 50 U.S.C. App. § 9).[2] *See, e.g.*, *Von Zedtwitz v. Sutherland*, 26 F.2d 525 (D.C. Cir. 1928) (affirming district court's conclusion that claimant presented insufficient evidence in support of challenge to Custodian's seizure of property). This Court recognized that some avenue for review of an executive determination of enemy status "in case of mistake," far from raising political questions, was constitutionally mandated. *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 566 (1921). *See also Stoehr v. Wallace*, 255 U.S. 239, 245 (1921).

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[2] The Government's suggestion that the judicial review authorized by the TWEA is irrelevant because enemy property designations under that statute are "made pursuant to the authority of a comprehensive statutory scheme administered by civilian officials" (Opp. 10) ignores the fact, recognized by the Court in *Stoehr v. Wallace*, that an enemy property designation and seizure made by the property custodian under the TWEA "is in effect the act of the President." 255 U.S. 239, 245 (1921).

The Government dismisses Petitioners' analogy to the TWEA as inapposite, arguing that executive determinations of enemy status under that Act are nothing more than "administrative designations," derived not from the President's Article II authority as Commander in Chief but from war powers delegated by Congress. Opp. 10. That argument misses the point. Executive seizures of enemy property under the TWEA were critical to the war effort. In order to review the facts supporting those seizures, the district courts necessarily considered the same complex security issues and sensitive factual questions that the courts below rejected as non-justiciable. App. 34a.[3] Even more importantly, TWEA claimants would have been entitled to bring takings claims had Congress not provided a parallel process in the district courts under the TWEA. The Government advanced this very point in defending an interpretation of an amendment to the TWEA that would have precluded foreign nationals from suing for restoration of their property: "To avoid conflict with the constitutional prohibition against the taking of property of friendly aliens without just compensation . . . the Custodian suggests that appellant may obtain just compensation . . . in the Court of Claims." *Uebersee Finanz-Korporation v. Markham*, 158 F.2d 313, 314 (D.C. Cir. 1946). The Supreme Court rejected the Government's proffered interpretation but acknowledged that the Fifth Amendment would afford non-enemy aliens the right to seek just compensation in any event. *See Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 487-88

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[3] *See, e.g., Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 484-85 & n.3 (1947) ("[i]t was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral" and that "some of the most dangerous of the Axis-influenced enterprises [were] Swiss, Dutch, Swedish or American.") (internal quotation marks omitted).

(1947) (hesitating to "assume that Congress treated all non-enemy nations, including recent allies, in such a harsh manner, *leaving them only with such remedy as they might have under the Fifth Amendment*") (emphasis added). *See also Silesian-American Corp. v. Markham*, 156 F.2d 793, 797 (2d Cir. 1946) (holding that, even if a friendly alien cannot reclaim property under the TWEA, he cannot be deprived of it without payment of just compensation) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). Thus, the Government correctly notes that a friendly alien's opportunity to obtain *restoration* of property erroneously designated under the TWEA is merely Congressionally authorized, but the opportunity to obtain *compensation* for the same erroneous designation is constitutionally required.

Petitioners do not dispute that the President must be free to act upon reliable national security intelligence in deciding to destroy property he reasonably believes to be that of an enemy, even if that intelligence ultimately proves false. What Petitioners seek is not judicial supervision of the executive decision-making process, but rather an opportunity to demonstrate that the destruction of the El-Shifa plant was mistaken, although authorized – and therefore compensable. That opportunity poses no threat to military decision-making. As this Court explained in *Hamdi*, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" involving executive designations of enemy status. 124 S. Ct. at 2649-50. Nothing in *Hamdi*, and no argument pressed by the Government here, suggests that that principle applies with less force to designations of enemy *property* status than to those of enemy combatant status.

CONCLUSION

For these reasons, as well as those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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